Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–235 OF 2010
APANDI ALI, LINTON ALBERT AND MOHTARUDIN BAKI JJCA
3 JUNE 2013

Administrative Law — Remedies — Judicial Review — Banning of book — Appeal against decision — Whether order to ban book rational and legal — Printing Presses and Publications Act 1984 — Delegation of Powers Act 1956

Constitutional Law — Executive — Deputy Ministers — Powers — Whether Deputy Minister could assume role of Minister by signing order banning book — Whether Minister had adequate reasons to conclude that book was prejudicial to public order — Federal Constitution art 43A — Delegation of Powers Act 1956

This was an appeal against the dismissal of an application for judicial review in the High Court where the appellant sought for a declaratory order that the Minister's order was invalid and null and void; an order of certiorari to quash and/or set aside the Minister's order; and damages under O 53 r 5 of the Rules of the High Court 1980 following the banning of a book entitled 'Mac 8'. In the present appeal, the appellant relied only on two grounds, namely, irrationality and illegality. The appellant argued that the High Court had erred when it failed to hold that the second respondent did not have sufficient material or adequate reasons before him, if at all, to objectively conclude that the appellant's book was prejudicial to public order. Despite the subjective discretionary power of the Minister, it was further argued by the appellant that the law required an objective assessment to be undertaken by the Minister. The appellant also took issue on the fact that the order banning the book was signed by the second respondent, ie the then Deputy Minister of Internal Security. It was argued that the Deputy Minister could not assume the role of a Minister and that art 43A of the Federal Constitution ('Constitution') does not delegate powers of Ministers to Deputy Ministers.

Held, dismissing the appeal:

(1) The legal issue here was not as simplistic as proposed by the appellant. It was not a clear case of objective test or subjective test but a fusion of both. It depended on the wordings of the enabling law that conferred such powers to the Minister. The challenge to the exercise of the Minister's power, in this case, was in respect of the powers under s 7 of the Printing

Presses and Publications Act 1984. The wordings in s 7(1) 'if the Minister is satisfied' and 'he may in his absolute discretion by order' were clear manifestations of the power being vested personally in the minister and corollary to that vesting, any exercise of such power was to the subjective satisfaction of the Minister. Here the test for such satisfaction was subjective. It was without doubt a subjective discretionary power of the minister (see paras 9 & 10).

(2) The decision by the Deputy Minister to ban the book was neither so outrageous that defied logic nor against any accepted moral standards. The action taken by the Deputy Minister was one that was needed to be taken in the interest of national security, including public order, for which the executive bore the responsibility and alone had access to sources of information that qualify it to decide what the necessary action was and whether the decision was irrational or not, was a question of facts, to be decided by the judge (see para 14).

(3) From the reading of cl (2) of art 43A, it was clear that in assisting the Minister in their functions and duties, a Deputy Minister does have all the powers of the Minister. Clause (3) of the same article was indicative of the constitutional position of a Deputy Minister. This constitutional provision of the powers of the Deputy Minister was further compounded by the provisions in s 6(1) of the Delegation of Powers Act 1956 (see para 18).

(4) When enforcing the fundamental liberties as enshrined in our Constitution, it was also fundamental that such liberties were not absolute. The right to publish a book comes within the liberty enshrined in art 10 of the Constitution. Such freedom under art 10 was subjected to the restrictions under art 10(2). Such restrictions were those that would come into existence at the behest of Parliament which had the discretion to enact any such laws (see para 24).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap penolakan permohonan untuk semakan kehakiman di Mahkamah Tinggi di mana perayu memohon untuk perintah perisytiharan bahawa perintah Menteri adalah tidak sah dan terbatal; perintah certiorari untuk membatalkan dan/atau mengetepikan perintah menteri; dan ganti rugi di bawah A 53 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 berikutan pengharaman buku bertajuk 'Mac 8'. Dalam rayuan ini, perayu bergantung ke atas hanya dua alasan, iaitu tidak munasabah dan menyalahi undang-undang. Perayu berhujah bahawa Mahkamah Tinggi tersilap apabila ia gagal untuk memutuskan bahawa responden kedua tidak mempunyai material yang mencukupi atau alasan wajar di hadapannya, jika tidak, untuk secara objektif memutuskan bahawa buku perayu adalah memprejudiskan kententeraman awam. Walaupun terdapat kuasa budi bicara subjektif Menteri,

ia selanjutnya dihujahkan oleh perayu bahawa undang-undang mengkehendaki penilaian objektif untuk dijalankan oleh Menteri. Perayu juga membangkitkan isu atas fakta bahawa perintah pengharaman buku tersebut ditandatangani oleh responden kedua iaitu Timbalan Menteri Keselamatan Dalam Negeri ketika itu. Ia dihujahkan bahawa Timbalan Menteri tidak dapat memegang peranan Menteri dan bahawa perkara 43A Perlembagaan Persekutuan ('Perlembagaan') tidak memberikan kuasa Menteri kepada Timbalan Menteri.

Diputuskan, menolak rayuan:

(1) Isu undang-undang di sini bukan terlalu mudah seperti yang dicadangkan oleh perayu. Ia bukan kes jelas ujian objektif atau ujian subjektif tetapi pergabungan kedua-dua. Ia bergantung perkataan-perkataan undang-undang yang membolehkan yang memberikan kuasa sedemikian kepada Menteri. Cabaran kepada pelaksanaan kuasa Menteri, dalam kes ini, adalah berkenaan kuasa-kuasa di bawah s 7 Akta Mesin Cetak dan Penerbitan 1984. Perkataan-perkataan di dalam s 7(1) 'if the Minister is satisfied' dan 'he may in his absolute discretion by order' adalah penyataan dengan jelas kuasa yang diletakhakkan secara persendirian kepada menteri dan berikutan perletakhakkan tersebut, apa-apa pelaksanaan kuasa sedemikian adalah kepuasan subjektif menteri. Di sini ujian untuk kepuasan sedemikian adalah subjektif. Adalah tanpa sangsi ia kuasa budi bicara subjektif menteri (lihat perenggan 9 & 10).

(2) Keputusan oleh Timbalan Menteri untuk mengharamkan buku bukan mengejutkan yang menentang logik atau bertentangan apa-apa standard moral yang diterima. Tindakan yang diambil oleh Timbalan Menteri adalah satu yang perlu diambil dalam kepentingan keselamatan negara, termasuk ketenteraman awam, yang mana eksekutif memegang tanggungjawab dan dengan sendiri mempunyai peluang kepada punca-punca maklumat yang meluluskannya untuk memutuskan apa tindakan yang perlu dan sama ada keputusan tak munasabah atau tidak, adalah persoalan fakta, untuk diputuskan oleh hakim (lihat perenggan 14).

(3) Daripada pembacaan klausa (2) perkara 43A, adalah jelas bahawa dalam membantu Menteri dengan fungsi dan tugas mereka, Timbalan Menteri mempunyai kesemua kuasa menteri. Klausa (3) perkara yang sama menunjukkan kedudukan berpelembagaan Timbalan Menteri. Peruntukan berpelembagaan kuasa Timbalan Menteri selanjutnya dicampurkan dengan peruntukan dalam s 6(1) Akta Perwakilan Kuasa 1956 (lihat perenggan 18).

(4) Apabila menguatkuasakan kebebasan asasi seperti yang dinyatakan di dalam Perlembagaan, ia juga sangat penting bahawa kebebasan tersebut

bukan mutlak. Hak untuk menerbitkan buku terbentuk dalam kebebasan yang ditetapkan di dalam perkara 10 Perlembagaan. Kebebasan sedemikian di bawah perkara 10 tertakluk kepada sekatan-sekatan di bawah perkara 10(2). Sekatan-sekatan sedemikian adalah yang wujud mengikut perintah Parlimen yang mana mempunyai budi bicara untuk menggubal apa-apa undang-undang sedemikian (lihat perenggan 24).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 98–125.

Cases referred to

Council of Civil Service Unions and Others v Minister For The Civil Service [1985] 1 AC 374, HL (folld)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307; [2010] 1 CLJ 300, FC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)

Lord Steyn v Home Secretary [2001] 2 AC 523 (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449 ; [2002] 4 CLJ 309, FC (refd)

SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2006] 1 MLJ 727, CA (refd)

Legislation referred to

Delegation of Powers Act 1956 s 6(1)
Federal Constitution arts 10, 10(2), 43A
Ministerial Functions Act 1969 s 2
Ministers of the Federal Goverment (Amendment) (No 2) Order 2006
Printing Presses and Publications Act 1984 s 7, 7(1)
Rules of the High Court 1980 O 53 r 5

Appeal from: Judicial Review No R3(R2)–25–43–2007 (High Court, Kuala Lumpur)

Edmund Bon (Fahri Azzat and Chan Yen Hui with him) (Chooi & Co) for the appellant.

Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Apandi Ali JCA:

INTRODUCTION

[1] This is an appeal against the dismissal of an application for judicial

review. In the judicial review application at the High Court the appellant seeks the following orders and reliefs:

(a) declaratory order that the Minister's order is invalid and null and void;

(b) an order of certiorari to quash and/or set aside the Minister's order; and

(c) damages under O 53 r 5 of the Rules of the High Court 1980.

[2] The said application was in respect of the banning of a book in Tamil Language entitled 'Mac 8' which was published sometime on 8 of April 2006 and was banned by the respondents by an order dated 21 November 2006, in exercise of power under s 7(1) of the Printing Presses and Publication Act 1984. This order, identified as Printing Presses and Publications (Control of Undesirable Publications) (Number 15) Order 2006, was published via Government *Gazette* dated 28 December 2006.

[3] At the High Court, the appellant relied on all possible grounds to challenge the banning of the said book, namely illegality, procedural impropriety, irrationality and proportionality.

[4] However on appeal, before us, the learned counsel for the appellant relied only on two grounds, ie (a) irrationality and (b) illegality. This court nevertheless dismissed the appeal and we shall now give our reasons.

THE APPELLANT'S ARGUMENT

[5] As the appellant's appeal is anchored on the two grounds mentioned above, we shall deal with them respectively.

On irrationality

[6] Learned counsel for the appellant argued that the High Court had erred when it failed to hold that the second respondent did not have sufficient material or adequate reasons before him, if at all, to objectively conclude that the appellant's book was prejudicial to public order.

[7] Relying on the cases of *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 and *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309, counsel argued that to apply the objective test it must be shown that the Minister or Deputy Minister must have read and considered the contents of the book. It was also argued that whatever recommendations by the *Bahagian Kawalan Penerbitan dan Teks Al-Quran*, which was relied upon by the Deputy Minister, was never produced during the judicial review proceedings.

[8] From the above arguments, it seems that the crux of the appellant's contention is that the test to be applied on the issue of 'prejudicial to public order' is an objective test instead of a subjective test.

[9] It is our considered view that the legal issue here is not as simplistic as proposed by the appellant. It is not a clear case of objective test or subjective test. It is a fusion of both! It depends on the wordings of the enabling law that conferred such powers to the Minister. The challenge to the exercise of the Minister's power, in this case, is in respect of the powers under s 7 of the Printing Presses and Publications Act 1984. It is therefore pertinent to examine closely such given powers which is formulated under s 7(1) of the Act, which reads as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sounds, music, statement or any other thing which is in anyway prejudicial to or likely to be prejudicial to public order … he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication.

[10] The wordings in s 7(1), 'if the Minister is satisfied' and 'he may in his absolute discretion by order' are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister.

[11] Eventhough these exist the subjective discretionary power of the Minister, it was further argued by the appellant that the law requires an objective assessment be undertaken by the Minister. The appellant relied on the Federal Court decision in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300 in particular where it reads as follows:

> Applying this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

[12] On the facts, it is clear that Dato' Fu Ah Kiow, the Deputy Minister who affirmed in his affidavit in reply, dated 28 August 2008, that he had studied all

the reports and recommendations in respect of the book. This can be seen in para 13 of his affidavit of reply which reads as follows:

> 13 Saya telah meneliti syor dan ulasan yang dikemukakan oleh bahagian Kawalan Penerbitan dan Teks Al-Quran dan sebelum memutuskan untuk melarang penerbitan buku pemohon, saya telah mempertimbangkan perkara-perkara yang berikut.
>
> 13.1 Terdapat laporan dan aduan yang dikemukakan oleh ibu pejabat polis berdasarkan kajian mengenai kesan buku pemohon terhadap keharmonian kaum, keselamatan negara dan ketenteraman awam yang boleh meracuni fikiran dan minda orang awam yang membaca khususnya kaum India yang membaca buku pemohon yang diterbitkan dalam Bahasa Tamil sahaja.
>
> 13.2 Bahagian Kawalan Penerbitan dan Teks Al-Quran juga telah mengkaji isi kandungannya dan mendapati buku pemohon menyiarkan isu-isu perkauman yang boleh memudaratkan ketenteraman awam dan keselamatan negara.
>
> 13.3 Saya telah mempertimbangkan kajian yang dikemukakan kepada saya dan pada 21 November 2006 saya telah bersetuju dengan syor yang dikemukakan oleh Bahagian Kawalan Penerbitan dan Teks Al-Quran. Memandangkan ini merupakan isu keselamatan dalam negara maka ia hendaklah ditangani dengan segera.
>
> 13.4 Tindakan yang saya ambil untuk mewartakan buku pemohon sebagai buku yang dilarang pencetakan dan penerbitannya. Tindakan ini adalah selaras dengan bidang kuasa yang diberikan kepada saya bagi mengelakkan kejadian serupa dengan kejadian Kampung Medan dari berulang dan lebih ramai orang awam diracuni fikiran mereka oleh kata-kata yang ditulis dalam buku pemohon.

[13] On the issue of irrationality, which is intertwined with the subjective discretionary power of the Minister, which has got to be objectively viewed by the court, it is our judgment that we see no reason to depart from the conclusions of the learned trial judge, who has succinctly written in his grounds of judgment, which, inter alia, reads as follows:

> This present book is written on the Kampung Medan racial disturbance. That is a public order and national security issue in itself. True, major parts of the book are derived from a PhD thesis, but an academic work couched in rather sedentary and dispassionate language, and made accessible only to a select few at the university, cannot be equated with a book meant for general consumption, and targeted for the Indian community who are portrayed in the book as the victims. This court has to be also mindful of the social and cultural sensitivities of the respective communities in Malaysia and balance it against the need to preserve and protect human rights. Both the statutory and constitutional framework has to be objectively balanced against these sensitivities. In the final analysis, it has to asked and answered whether there were materials before the Deputy Minister on which he could decide as he did

in exercise of the statutory objectives of the Act. Objectively viewed, I am of the view there were facts available for the deputy Minister upon which he could conclude that the book would be prejudicial to public order. In exercise of its judicial review jurisdiction, this court should not supplant the Minister's subjective satisfaction with its own, unless the bounds of legality, in the sense explained above, are clearly transgressed.

[14] It is our judgment that on the facts of the case the decision by the Deputy Minister to ban the book is neither so outrageous that defies logic nor against any accepted moral standards. The action taken by the Deputy Minister was one that is needed to be taken in the interest of national security (including public order) for which the executive bears the responsibility and alone has access to sources of information that quality it to decide what the necessary action is. And whether the decision is irrational or not, is a question of facts, to be decided by the judge. This is the rationale of Lord Diplock in *Council of Civil Service Unions and Others v Minister For The Civil Service* [1985] 1 AC 374, at p 410, which we followed.

[15] On that note, we hold that there is no merit on the appellant's argument on irrationality.

On illegality

[16] The appellant took issue on the fact that the order banning the book was signed by the second respondent, ie the then Deputy Minister of Internal Security. It was argued that the Deputy Minister cannot assume the role of a Minister and that art 43A of the Federal Constitution does not delegate powers of Ministers to Deputy Ministers.

[17] Our analysis on this contention are as follows. In order to appreciate the extent of the powers of a Deputy Minister, it is pertinent to refer to the relevant provisions of art 43A, which reads as follows:

> 43A Deputy Ministers.
>
> (1) …
>
> (2) Deputy Ministers shall assist Ministers in the discharge of their duties and functions, and for such purpose shall have all the powers of Ministers.
>
> (3) The provisions of clauses (5) and (6) of Article 43 shall apply to deputy Ministers as they apply to Ministers.

[18] From the reading of cl (2) of art 43A, it is clear that in assisting the Minister in their functions and duties, a Deputy Minister does have all the

powers of the Minister. And cl (3) of the same article is indicative of the constitutional position of a Deputy Minister. This constitutional provision of the powers of the Deputy Minister is further compounded by the provisions in s 6(1) of the Delegation of Powers Act 1956, which reads as follows:

> Subject to section 11 and of any written law expressly to the contrary all acts, orders or directions which could lawfully be done or given, in the exercise of any power or in the performance of any duty conferred on imposed by any written law, by a Minister … may, subject to any directions given by him be validly and effectually done or given on his behalf and in his name by any officer under his administrative control and expressly or impliedly authorized by him generally or specially thereto or in the case of a Minister be done or given on his behalf and in his name by the Deputy Minister.

[19] To be doubly sure of the powers of a Deputy Minister of Internal Security, a subsidiary legislation made under the Ministerial Functions Act 1969 are evidence of the expressed legitimacy of the Deputy Minister's power to perform and function. The relevant parts of the subsidiary legislation, namely Ministers of the Federal Goverment (Amendment) (No 2) Order 2006, reads as follows:

> IN exercise of the powers conferred by section 2 of the Ministerial Functions Act 1969 [Act 2], the Yang di-Pertua Agong makes the following order:
>
> Citation and commencement
>
> 1
>
> (1) This order may be cited as *Ministers of the Federal Government (Amendment) (No. 2) Order 2006*.
>
> (2) Subject to subparagraph (3), this Order is deemed to have come into operation on 17 February 2006.
>
> (3) Notwithstanding subparagraph (2), subparagraph 2(i) is deemed to have come into operation on 13 April 2005.
>
> Amendment of Schedule
>
> 2 The Schedule to the Ministers of the Federal Government (No. 2) Order 2004 [P.U. (A) 206/2004] is amended -
>
> (a) in respect of the Prime Minister's Department -
>
> (i) by deleting the words 'Dato' Mustapa bin Mohamed' appearing in the 'Persons' column and the words 'Minister in the Prime Minister's Department' appearing against it in the 'Styles and Titles' column;
>
> (ii) by deleting the words 'Dato' Mohd. Radzi bin Sheikh Ahmad' appearing in the 'Persons' column and the words 'Minister in the Prime Minister's Department' appearing against it in the 'Styles and Titles' column;

(iii) by inserting in the 'Persons' and 'Styles and Titles' columns after the words 'Dato' Dr. Abdullah bin Md. Zin' the following words:

'Senator Dato Sri Mohd Effendi bin Norwawi	Minister in the Prime Minister's Department'; and

(iv) by inserting in the 'Persons' and 'Styles and Titles' columns after the words 'Encik Joseph Entulu anak Belaun' the following words:

'Senator Dato' Haji Raman bin Sulaiman	Abdul Deputy Minister in the Prime Minister's Department';

(b) …

(c) in respect of the Ministry of Internal Security -

(i) by substituting for the words 'Dato' Noh bin Omar' appearing in the 'Persons' column the words 'Dato' Fu Ah Kiow'; and

(ii) …

[20] This subsidiary legislation when read together with an earlier one, ie Ministers of the Federal Government (No 2) Order 2004 which was published via notification PU(A) 206, will clearly define the ministerial functions of the deponent of the affidavit in reply in this case, namely Dato' Fu Ah Kiow.

[21] Under the said Ministers of the Federal Government (No 2) Order 2004, the Minister and Deputy Minister are expressly identified, together with their list of responsibilities. All these are mentioned in the Schedule to the order. Section 2(2) of the order reads:

2. (1) …

(2) The person whose name is mentioned first in the first column of the Schedule in relation to any department or subject specified in the third and fourth columns corresponding to his name shall be the person charged with the responsibility for that department or subject and shall be assisted by the persons whose names appear underneath that first mentioned person's name in the first column.

[22] The relevant second, third and forth columns of the Schedule, reads as follows:

Departments	Subjects
Ministry of Internal Security:	Formulates and implement policy on security and public order
	Responsible for the preservation and maintenance of public order, harmony and internal security
	Performs functions and exercises powers under the:
	Internal Security Act 1960
	Dangerous Drugs (Special Preventive Measures) Act 1985'

[23] For the above reasons we also find that there is no merit in the appellant's second ground of illegality.

CONCLUSION

[24] In conclusion, we must add that when enforcing the fundamental liberties as enshrined in our constitution, it is also fundamental that such liberties are not absolute. It has been held by schools of jurisprudence that every right is correlated with a duty. The right to publish a book comes within the liberty enshrined in art 10 of the Federal Constitution. Such freedom under art 10 is subject to the restrictions under art 10(2). Such restrictions are those that will come into existence at the behest of Parliament which has a discretion to enact any such laws.

[25] On this jurisprudence, it may be appropriate to refer to what was observed by *Lord Steyn v Home Secretary* [2001] 2 AC 523 at p 548, which reads as follows:

> ln other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary ion a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as *Professor Jowell* [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything.

[26] At the home scene, it seems that from the decision in *Dr Mohd Nasir bin*

Hashim v Menteri [2006] 6 MLJ 213 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2006] 1 MLJ 727, it is clear that Parliament can impose reasonable restrictions on the said 'freedom'.

[27] That being the law, we see no reason for us to disturb the findings and conclusion of the learned trial judges. In that light we, unanimously dismissed the appeal. And as agreed between the parties, there is no order as to costs.

Appeal dismissed.

Reported by Afiq Mohamad Noor